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No. 85-1083

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

KENT AUGUST MOECKLY,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

SHOULD SEVERANCE BE GRANTED WHERE SUBSTANTIALLY ALL OF THE EVIDENCE PERTAINS TO ACTS COMMITTED BY THE CO-DEFENDANTS, INCLUDING ACTS PREDATING THE CHARGED CONSPIRACY AND EVINCING A PRIOR, UNRELATED CONSPIRACY?

II.

IS VENUE A PROPER ISSUE FOR SUBMISSION TO THE JURY?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, KENT AUGUST MOECKLY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

United States of America v. Kent August Moeckly, Joseph Diego Ramirez, and William J. Coulombe.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra, A-1, is reported at 769 F.2d 453 (1985).

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra, B-1) was entered on July 15, 1985.

An Order of the Court of Appeals denying rehearing en banc was entered on October 17, 1985 (Appendix C, infra C-1).

The jurisdiction of the court is based upon 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Article III, Sec. 2, cl. 3:

> "The trial of all crimes, except in Cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

United States Constitution Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; * * *."

PROCEDURAL PROVISIONS

Federal Rule of Criminal Procedure 18:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."

STATEMENT OF THE CASE

Petitioner was convicted of two counts of perjury before a Grand Jury in violation of 18 U.S.C. Section 1623, one count of conspiracy to import cocaine in violation of 21 U.S.C. Section 963 and one count of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. Section 864, after trial by jury from September 24, 1984 through October 4, 1984 in the District of Minnesota. The basis for jurisdiction in the District Court was 18 U.S.C. Section 3231.

On November 13, 1984, Petitioner was sentenced to a term of seven years imprisonment and a fine of $10,000. He is presently incarcerated.

The evidence showed that on April 19, 1983, Petitioner, Kent August Moeckly, was in Florida at the same time as co-defendants Ramirez and Coulombe. The evidence further disclosed that Greg Schmidt, a pilot for Ramirez' company, flew from Minnesota to Florida. Ramirez, Schmidt and Coulombe had a conversation about flying a smuggling mission the next day. Petitioner was not a party to that conversation.

The following day, Coulombe abandoned a small airplane with twelve (12) dufflebags of cocaine after being pursued by United States Customs' planes. Ramirez and Schmidt each flew separate airplanes as cover for Coulombe. Petitioner also flew an airplane that day. While in the air, Ramirez spoke with Coulombe several times over the airplane radio. Petitioner was not a party to those conversations. All of these events occurred in Florida. Prior to trial, co-defendants Ramirez and Coulombe moved to dismiss the indictment for lack of venue and again objected at the close of all the evidence (App. A, page 9). Petition-

er also moved to dismiss the indictment on the ground of lack of jurisdiction in Minnesota. Ramirez proposed an instruction joined by Coulombe and Petitioner requesting the District Court to instruct the jury that venue must be proved in the District of Minnesota (App. A, page 9). The District Court refused, stating that venue was not "in issue" (App. A, page 12).

The trial court denied Petitioner's motion for severance and failed to give a venue instruction to the jury. The jury returned a guilty verdict on the perjury and conspiracy counts. Because the jury had not been instructed that it must find at least one overt act or the conspiracy agreement occurred in Minnesota in order to convict, it is impossible to determine whether the government met its burden of proving venue.

During the trial, the government called numerous witnesses to establish Moeckly's presence in Minnesota during the time the conspiracy was alleged to have occurred and to substantiate the charges against Ramirez, Coulombe and Petitioner. However, this testimony indicated that Moeckly was present in Minnesota only as a visitor and that he was actually a resident of South Dakota. Further, the introduction of that testimony spilled over to Petitioner and implicated him in the cocaine conspiracy and charges brought against the other defendants. For this reason, Petitioner moved to sever the actions against the three co-defendants.

The trial court denied Petitioner's motion for severance and failed to give a venue instruction to the jury. The Court of Appeals held that the evidence supported these convictions and that the trial court's failure to give a venue instruction to the jury was not prejudicial.

REASONS FOR GRANTING THE WRIT

The Writ should be granted because the decision of the Eighth Circuit Court of Appeals on the severance question ignored the rignts guaranteed a criminal defendant by the Sixth Amendment and Article III of the United States Constitution and the decision of the Eighth Circuit Court of Appeals conflicts with other decisions of the Eighth Circuit, with another Circuit Court of Appeals decision, and with applicable decisions of this Court.

There was compelling prejudice in the present case, due to the quality and quantity of evidence pertaining to co-defendant Ramirez which had the effect of "spilling" over" to Petitioner's defense. That "spilling over" resulted in jury confusion and jury inability to separate the testimony of these two defendants.

Of the 928 pages of trial transcripts covering the testimony of government witnesses, only 64 pages related directly to Petitioner, and even those references did not pertain to the conspiracy counts. Rather, they primarily pertained to the perjury counts. Testimony relating to Ramirez was frequent and implicated him in both past acts and the present conspiracy.

The testimony of these government witnesses resulted in a "spilling over" of the evidence in that it prejudicially and erroneously implicated Petitioner. In that way, Moeck-'y was not convicted on his own acts but on the stigma attached to him by the acts of Ramirez. *Spencer v. Texas*, 385 U.S. 554 (1967).

In *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981), the 8th Circuit on substantially similar facts held that evidence of prior acts which occurred years before the scope of the present charges was so prejudicial that they

required severance. That Court, in reversing the conviction, held that

> "we conclude that the District Court abused its discretion in not severing Handy's trial from that of Engleman . . ."

In this case, the voluminous evidence relating to Ramirez which was heard outside the scope of the indictment, made the case too complicated for jury instructions to cure the confusion. Under these circumstances, the jury obviously became confused and was unable to compartmentalize the evidence pertaining to Ramirez from that pertaining to Petitioner.

As the Court has an ongoing duty to be watchful for prejudice, severance should have been granted when it became apparent that Petitioner would be more likely to be found guilty by his association with a large amount of damaging evidence offered against Ramirez rather than upon the evidence against him. *Shaffer v. United States,* 362 U.S. 511 (1960). In *United States v. Mardian,* 546 F.2d 973 (D.C. Cir. 1976), the Court reversed the conviction where the evidence pertaining to one defendant was, as here, miniscule as compared to that presented against the other defendants. Denial of Petitioner's motion for severance when it was raised during the trial, and after the completion of the government's case in light of this prejudice was an abuse of discretion and therefore reversible error.

Rule 14 of the Federal Rules of Criminal Procedure provides a "safety valve" when the potential for prejudice outweighs the need to promote judicial economy and efficiency. *Bruton v. United States,* 391 U.S. 123, 88 S.C. 1620,

20 L.E.2d 476 (1968). As Mr. Justice Jackson stated in *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716 93 L.Ed. 790 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

Where the Government proves the existence of separate conspiracies to which defendant is not a party, severance should be granted. *Kolteakos v. United States,* 328 U.S. 750 (1946).

The Writ should also be granted because the trial court erred by not instructing the jury that the prosecution had the burden to prove that this case was properly venued in Minnesota. In criminal prosecutions, a proper venue is constitutional right. Article III and Sixth Amendment in the United States Constitution require that criminal trials be held in he district where the crime was committed. According to *United States v. Overshon,* 494 F.2d 894 (8th Cir. 1974), venue is proper in either the jurisdiction where the conspirators made their agreement or where any conspirator committed an overt act in furtherance in the conspiracy.

The government must prove by preponderance of the evidence that the prosecution is in the proper district as an essential element of its case. See *United States v. Black Cloud,* 590 F.2d 270 (8th Cir. 1979). In *Black Cloud,* the 8th Circuit held that the jury should be instructed on venue when it is "in issue". Venue was in issue in *Black Cloud* because there was a factual dispute as to where the crime occurred. In Moeckly's case, the 8th Circuit recognized that venue was in issue because there was a question as to

where the criminal act occurred and also because no venue instruction was given to the jury.

Instead of relying on *Black Cloud*, the 8th Circuit decided the venue question according to *United States v. Netz*, 758 F.2d 1308 (8th Cir. 1985). *Netz* should not control here because venue was not in issue in that case. There was neither conflicting evidence as to where the offense occurred nor was there a need to establish venue by proof of an overt act or an agreement because no conspiracy had been charged.

In this case, the conspirators made their agreement in Florida and the overt acts took place in Florida and the Bahamas. The rule is that "the prosecution shall be had in a district where the offense was committed." Federal Rule of Criminal Procedure 18. Therefore, tht conspiracy prosecution should have been brought in Florida rather than in Minnesota.

The most important reason that the Writ should be granted is that the opinion of the 8th Circuit and in *United States v. Netz, supra*, conflicts with a case of this Court which is directly on point: *United States v. Jackalow*, 66 U.S. 484 (1 Black 1862). In *Jackalow*, the Court held that questions of venue must be submitted to the jury under proper instructions from the Court. 66 U.S. at 488.

This usurpation of the jury's role conflicts with two other decisions of this Court: *In Re Winship*, 397 U.S. 58, 363 (1970), requiring the government to prove every element of the offense and *Bollenbach v. United States*, 326 U.S. 607 (1946), condemning the practice of Appellate Courts finding harmless error if there is no doubt from the record that the Appellant is guilty.

The trial court's failure to instruct the jury that the

government had to prove venue denied the Petitioner's Sixth Amendment right to have his trial in the district where the crime was committed.

CONCLUSION

The Petitioner for Writ of Certiorari should be granted.
Dated this 13th dav of December, 1985.
Respectfully submitted,

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CERTIFICATE OF SERVICE

PHILLIP S. RESNICK, a member of the Bar of this Court, hereby certifies, pursuant to Supreme Court Rule 28, that a true and correct copy of the annexed PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE EIGHTH CIRCUIT was served upon the persons designated below, all on the date indicated, by depositing a copy thereof in the United States mail at Minneapolis, Hennepin County, Minnesota, postage prepaid, in envelopes addressed to the said addresses, to wit:

Solicitor General, Department of Justice, Washington, D.C. 20530

Mr. John Lee, Assistant U.S. Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401

Mr. Ronald I. Meshbesher, Attorney for Joseph Diego Ramirez, 1616 Park Avenue South, Minneapolis, Minnesota 55404

Mark W. Peterson, Attorney for William Coulombe, Suite 380, 608 Second Ave. South, Minneapolis, Minnesota 55402

Dated this 16th day of December, 1985.

Respectfully submitted,

RESNICK & BARTSH

AFFIDAVIT OF MAILING

STATE OF MINNESOTA

ss.

COUNTY OF HENNEPIN

PHILLIP S. RESNICK, being first duly sworn, deposes and states that:

1. He is Counsel of Record in the above-named case, and is a member of the Bar of this Court.

2. That to his knowledge the Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals (attached) in the above-named case was deposited on December 16, 1985 at the Main Post Office in Minneapolis, Minnesota, with first class postage and properly addressed to the Clerk of Court within the time permitted for filing such Petition (December 16, 1985).

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Phillip S. Resnick

Subscribed and sworn to before me this 13th day of December, 1985.

/s/ Elizabeth A. Dungan
Notary Public
Ramsey County, Minnesota
My Commission Expires May 10, 1991.

APPENDIX A

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 84-5223, 84-5224, 84-5225

United States of America,

Plaintiff-Appellee

vs.

Kent August Moeckly, Joseph Diego Ramirez, and William J. Coulombe,

Defendants-Appellants.

APPEAL from the United States District Court for the District of Minnesota.

Submitted: June 11, 1985
Filed: July 15, 1985

Before ARNOLD, Circuit Judge, PHILLIPS,* Senior Circut Judge, and JOHN R. GIBSON, Circuit Judge.

PHILLIPS, Senior Circuit Judge. Defendants Kent

*The HONORABLE HARRY PHILLIPS, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Moeckly, Joseph "Casey" Ramirez, and William Coulombe appeal separately their convictions for conspiracy to import cocaine, 21 U.S.C. § 963, and conspiracy to possess cocaine with intent to distribute it, 21 U.S.C. § 846. The indictment charged these conspiracies were in existence from early 1981 through April of 1983 and were carried out in Minnesota, Florida, and elsewhere. Appellant Moeckly also was convicted of two counts of perjury before a grand jury investigating defendants' smuggling activities, 18 U.S.C. § 1623. Following their convictions upon jury verdicts, they received the following penalties: Moeckly was sentenced to serve seven years of imprisonment and received a $10,000 fine. Coulombe received a total penalty of ten years of confinement and a $10,000 fine. Ramirez received a total sentence of twenty years of confinement and a $50,000 fine. Defendants filed timely appeals to this court. We affirm the convictions.

I.

This prosecution arose when a small airplane belonging to defendant Ramirez was abandoned in the Bahamas with twelve duffel bags of cocaine after being pursued by United States custom planes. Ramirez operated a fixed-base operation at the Princeton, Minnesota airport, a business providing storage and maintenance services for private airplanes, as well as flight lessons.

On April 20, 1983 Ramirez placed a telephone call from Florida to Gregory Schmidt in Minnesota, requesting him to fly one of Ramirez' planes, a Cessna 210, No. 6544 Yankee, from Princeton to Florida. Schmidt was the prosecution's chief witness; he testified under a promise of immunity from prosecution for smuggling charges. The next

day, Schmidt flew the plane to Fort Lauderdale and was met at the airport by Ramirez and Moeckly. The three went to a townhouse owned by Ramirez and later returned to the airport. They installed four or five extra fifteen gallon fuel tanks into another of Ramirez' planes, a Cessna 210, No. 6608 Charlie, and had it fueled. Ramirez gave a $100.00 tip to the person who fueled the plane. The three then returned to Ramirez' townhouse.

Schmidt testified that Coulombe came by the townhouse sometime that evening. Ramirez decided that it would be Coulombe, and not Schmidt, who would fly 6608 Charlie on a smuggling mission from South America and be paid $50,000. Later that night, Schmidt and Moeckly prepared a large lunch for Coulombe's flight. The following morning, Friday, April 22, 1983, Ramirez, Schmidt, and Moeckly loaded the lunch, a life raft, and other gear onto 6608 Charlie, and connected auxiliary fuel pumps. The co-pilot's seat had been taken out of the plane. Coulombe checked out of his hotel at 6:20 a.m., met the others at the airport, and took off with a single male passenger. That afternoon, Ramirez' girlfriend, Pamela Jackson, arrived to vacation with him.

On Saturday afternoon, Ramirez asked Schmidt and Moeckly to fly his planes in a "cover" operation to determine whether Coulombe was being pursued by customs aircraft upon his return. Ramirez was to fly another of his planes. They operated on a particular radio frequency and were to use prearranged codes. Moeckly was to fly "touch and goes" at the Opa Locka West airport, a remote and unoccupied airport where, according to Schmidt, Ramirez and Moeckly had landed on a previous occasion, and Moeckly had criticized Ramirez for using his name on the radio frequency.

Schmidt heard Ramirez and Coulombe converse and Ramirez gave a signal to indicate trouble. Ramirez gave instructions to evade two customs planes that were in pursuit. Schmidt and Moeckly landed their planes at Boca Raton airport after Ramirez and Coulombe had decided to abandon Florida airspace. Moeckly told Schmidt that Coulombe and Ramirez flew to the Bahamas and that they should stay away from Ramirez' townhouse. Pamela Jackson later relayed a message to Schmidt to fly to the Bahamas.

A customs pilot testified he observed evasive maneuvers by 6608 Charlie and that it finally headed toward the Grand Bahamas while continuing its evasive maneuvers. It made two approaches to a field, passed over Freeport airport, and landed on a dirt road between 5:00 and 5:15 p.m. The pilot observed green duffel bags in the plane. Ramirez landed at the Freeport airport at 5:20 p.m. in 5296 Yankee according to customs documents. At 7:00 p.m., Bahamian police located 6608 Charlie and removed five blue plastic gas cans and twelve duffle bags of cocaine. Schmidt landed at Freeport airport around 10:30 p.m. and was met by Ramirez who informed him that Coulombe had landed on the island. After a search, they found Coulombe and brought him to a hotel. Ramirez criticized Coulombe for not burning the plane. Coulombe was angry over the loss of the 400 pound cargo of cocaine.

In a secondary search of 6608 Charlie, sixteen international aeronautical maps were recovered. Eight of these bore 44 fingerprint impressions and seven palmprint impressions of Coulombe concentrated along the path to South America. One had multiplication figures apparently reflecting the pounds of cocaine loaded on the plane. Four

of Ramirez' fingerprint impressions were identified on one of the maps. The canvas bags were found to have 181 fiberglass-encased packages each containing a kilogram of cocaine, a total of 398 pounds.

On Sunday, April 24, 1983, Ramirez instructed Schmidt and Coulombe to ditch a seat from 6608 Charlie in the ocean. Upon their return that day to the United States in 5296 Yankee, Schmidt filed a customs report listing himself as pilot and Coulombe as a passenger. They returned to Ramirez' townhouse where Moeckly and Jackson were waiting. Ramirez flew back separately and went to the townhouse where he argued with Coulombe about his refusal to pay Coulombe for the mission. Schmidt and Moeckly then flew to Minnesota in 6544 Yankee.

Schmidt had flown from Minnesota to Florida to assist Ramirez in preparing 6608 Charlie for similar flights and had flown cover on other occasions in 1982. Schmidt had been acquitted of perjury in a trial in May 1984. He offered to testify in return for immunity from smuggling charges. The district court held a hearing to evaluate inconsistencies between statements he made and previous testimony he had given and to determine whether he had received immunity from perjury charges for his trial testimony. Schmidt previously had denied knowing how Coulombe got to the Bahamas and denied having searched for him with Ramirez. Schmidt admitted being threatened with prosecution if he refused to testify against Ramirez. He admitted to smuggling activity and cover operations that he had denied previously. At trial, Schmidt described previous operations with Ramirez that used common plans or schemes, including cover flights, use of the same plane, 6608 Charlie, and operations smuggling guns or drugs from

South America. He testified that Moeckly also had flown cover for Ramirez on another occasion.

Apart from Schmidt's testimony, the Government introduced other evidence of Ramirez' past activity. Stephen Lett testified, ov tion by Coulombe's counsel, that Ramirez made fo ps to the Bahamas with him, two of which involved attempts to purchase marijuana. Jack Devoe testified under a plea agreement conditioning the Government's sentencing recommendation on the quality and quantity of his trial testimony. He had pleaded guilty to federal smuggling charges and faced between thirty and ninety years of imprisonment. The sentencing recommendation would affect this sentence as well as parole eligibility and further immunity. Devoe testified he was aware that how he testified would affect his sentence. His testimony was allowed by the court despite objections that he had an incentive to perjure himself. Devoe testified that he had made several smuggling trips with Ramirez between 1980 and 1981, and helped Ramirez set up his own operation. He testified Ramirez admitted smu gling cocaine in Cessna 210 airplanes such as 6608 Charlie. Devoe had given testimony previously in other trials. The district court ordered the Government to supply this prior testimony to the defense, and it supplied Devoe's testimony from a federal trial in West Palm Beach and before a grand jury in Minneapolis. The Government was not able to supply his testimony before a Bahamian commission, testimony before a state grand jury in Miami, or testimony in a federal trial in Miami.

Marvin Osheroff, a Hialeah dry cleaner, testified over objection that Ramirez brought a green duffel bag to his establishment early in 1981. He stated that the bag was

full of over $1 million in cash that Ramirez transferred to some suitcases. Osheroff produced the bag and it was found to contain traces of cocaine. The bag was similar to those used to transport cocaine.

Over objection, Donald Perbix testified to large cash deposits Ramirez made at the Community State Bank of Princeton. Again over objection, Joyce Edmonds from the Princeton Credit Union testified to large cash transactions by Ramirez. Ramirez brought more than $850,000.00 in cash to the credit union over the years. The credit union would use the cash for daily operations and negotiation of checks, which it would deposit in Ramirez' account. On occasion, Moeckly accompanied Ramirez when he brought in cash and would bring in cash himself for deposit to Ramirez' account. Coulombe also accompanied Ramirez to the credit union on one occasion. Neither the bank nor the credit union filed cash transaction reports. Ramirez once deposited $100,000.00 in cash to the credit union for Devoe in the early 1980s. Moeckly delivered about $20,000.00 to Devoe in Florida. The remainder was paid in the form of three airplanes, one of which was delivered by Coulombe.

William Morris testified, over objection, that he discussed smuggling operations with Ramirez in the fall of 1981. Ramirez told him Moeckly was his co-pilot on some of the trips he had made and "that it was okay for [him] to speak freely about anything in front of him." Moeckly was not present at a later conversation between Ramirez and Morris in February of 1982 when Ramirez proposed that Morris fly decoy or cover operations for him. Morris also testified that he delivered auxiliary fuel containers to Ramirez and Moeckly for a mission Ramirez eventually called off.

Witness Gail Vail testified she ferried Ramirez' planes from Princeton to Florida on several occasions between November 1981 and January 1982. The planes included 6608 Charlie. On one occasion, she was met by Ramirez and Moeckly. Dennis Wolak testified that he ferried planes for Ramirez, including Cessna 210s, between Princeton and Florida in 1982.

During the grand jury investigation of Ramirez' activities, beginning in April 1982 Moeckly, an attorney, asserted his fifth amendment right against self incrimination in response to questions about Ramirez or ownership of aircraft. The assistant United States attorney asked Moeckly whether he had contacted particular attorneys, who were well known criminal defense lawyers, in connection with the investigation. Moeckly denied that he had kept a pilot log after 1978 and claimed he did not recall being in Florida during 1983. There was other grand jury testimony, however, that Moeckly had been in Florida, and had stayed with Ramirez and studied Spanish there. There was also testimony by his flight instructor, Gail Vail, that she recorded a flight instruction in Moeckly's log book and that he kept his records in pencil. Moeckly was convicted for perjury based on his denial of being in Florida or maintaining a log book. He was acquitted of perjury for his statement that he had never owned an aircraft. The district court denied defendants' motion to sever Moeckly's perjury charges from other charges.

Ramirez moved to dismiss the indictment prior to trial, asserting improper venue in Minnesota. Coulombe joined in this motion and another at the close of the evidence. The Government opposed the motion, contending that it would esablish venue during trial. Immediately prior to closing

arguments, Ramirez requested a venue instruction and submitted a proposed instruction. Although not in the record, Ramirez' counsel states he handed the court a note requesting a ruling on the venue instruction and the court sent a note indicating it was not going to instruct on this issue. The court denied a new trial after the jury rendered its verdict. The court held that applicable cases did not require a venue instruction because venue was not "in issue."

II.

Ramirez argues that the district court erred by refusing to instruct the jury that venue must be proved in the district of Minnesota. The Government argues that defendants' failure to object to the jury instrucions before the jury retired as required by Fed.R.Crim.P. Rule 30 operates as a waiver of objections. When a claim of error is not preserved, it may be reviewed only for plain error. *See United States v. Bear Ribs*, 722 F.2d 420, 424 (8th Cir. 1983). *United States v. Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980); *United States v. White*, 611 F.2d 531, 536 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980); *United States v. Honneus*, 508 F.2d 566, 571 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

Here Ramirez and Coulombe moved to dismiss for lack of venue prior to trial and again brought the matter to the court's attention at the close of the proof. Ramirez tendered a proposed instruction on venue and formally requested the instruction. He again raised the matter in a motion for a new trial. Ramirez and Coulombe have not waived their objections; the trial court clearly had an opportunity to correct any errors it may have made. *See United States v. Netz*, 758 F.2d 1308, 1311-12 (8th Cir. 1985) (per curiam)

(venue issue preserved when raised prior to trial and in motion for dismissal at close of case).

Proper venue is required by Article III, § 2 of the United States Constitution and by the sixth amendment, as well as Rule 18 of the Federal Rules of Criminal Procedure. Venue questions in criminal cases "raise deep issues of public policy" and "are not merely matters of formal legal procedure." *United States v. Johnson*, 323 U.S. 273, 276 (1944). In *United States v. Jackalow*, 66 U.S. (1 Black) 484 (1862), the Supreme Court reversed a piracy conviction on venue grounds. Although the jury found the offense was committed at a particular location, it was not instructed to find whether the location of the offense was within the jurisdiction of the district of New Jersey where the case was tried. The Court noted that the location of the offense was subject to a border dispute. It held that:

> the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury. All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact.

Id. at 487-88. The Court remanded for a new trial because the verdict did not furnish a basis for the Court to determine whether the offense occurred within the state.

In *United States v. Black Cloud*, 590 F.2d 270 (8th Cir.

1979), it was also unresolved whether the offense (receipt of a firearm by a convicted felon) took place in one State or another. There was conflicting evidence whether the defendant received the gun in North Dakota, where he was tried, or in South Dakota, which also was covered by the Standing Rock Reservation where he was arrested. The jury inquired during deliberations whether all cases in the reservation fell within the district. The court instructed, over objection, that its authority to hear the case was not dependent on where in the reservation the offense occurred. This court stressed that whether receipt of the firearm occurred in North Dakota where venue was proper is a question of fact for the jury. *Id.* at 272 (citing, *e.g.*, *Dean v. United States*, 246 F.2d 335 (8th Cir. 1957)). The court stressed that venue was a subject of "vigorous dispute" and remanded for a new trial because there was no finding of proper venue.

In the present case, the indictment charged six of twenty overt acts that concerned or occurred in Minnesota, including storage of the smuggling and "cover" planes, shuttling of the planes between Florida and Minnesota, contact between parties in those two states, and other preparations. The Government bears the burden to prove venue by a preponderance of the evidence. *United States v. Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985) (per curiam) (citations omitted). Proof of any of these overt acts makes venue in Minnesota proper. In *United States v. Overshon*, 494 F.2d 894 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974), the court noted that "venue as to prosecution of all members of a conspiracy lies either in the jurisdiction in which the conspiratorial agreement was formed or in any jurisdiction in which an overt act in furtherance of the conspiracy was

committed by any of the conspirators." *Id.* at 900 (citations omitted). Additionally, 18 U.S.C. § 3237(a) provides that an offense covering more than one district "may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

This case, unlike *Jackalow* and *Black Cloud*, does not involve an unresolved question of where the offenses occurred. The issue here is whether venue was proven where there was no finding by the jury that at least one overt act or the conspiratorial agreement occurred in Minnesota. The trial court held that an instruction on venue was not required because proof of the Minnesota acts was "overwhelming and uncontroverted" and venue therefore was not "in issue." Some finding by the jury on this issue should have been required. Venue is not "in issue" only when there is a question where a criminal act occurred, but also in cases such as this when defendants can be convicted of the offenses charged without an implicit finding that the acts used to establish venue have been proven.

Nevertheless, courts have recognized that proof of venue may be so clear in some cases that the failure to instruct on the issue is not reversible error. In *United States v. Netz*, 758 F.2d 1308 (8th Cir. 1985) (per curiam), the defendant was convicted of importation and possession with intent to distribute cocaine that was secreted in furniture shipped from South America to his home in the Western District of Missouri. He argued the court should have instructed on venue because the furniture had arrived in Florida en route to his home. This court, noting that venue for importation offenses is proper in any city along the route to the destination, upheld the district court's conclusion as a matter of law that there was no factual dispute concerning

proper venue. *Id.* at 1312. It stressed, however, that the better practice is to submit the issue for jury consideration. *Id.* Similarly, in *United States v. Overshon*, 494 F.2d 894 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974), the court upheld convictions for conspiracy to deal in firearms without a license when there was uncontroverted proof of several overt acts, including sales of firearms, within the district where trial was held.

In *United States v. Massa*, 686 F.2d 526 (7th Cir. 1982), the defendant was charged with several counts of filing fraudulent tax returns. The defendant testified he prepared tax returns for all his clients in his office in Lake County, Indiana, for which venue was proper. The fraudulent returns all were typed on the typewriter the defendant kept in his office. The court held venue was not in issue because there was no evidence the returns were prepared elsewhere. In such circumstances, the court held, the venue determination is for the court to make as a matter of law. *Id.* at 531. Similarly, in *United States v. Winship*, 724 F.2d 1116 (5th Cir. 1984), the court also found venue was not in issue. There the defendants, residents of Oklahoma, were convicted of drug distribution conspiracies in the Western District of Lousiana. Five of six coconspirators testified to distributing marijuana and methamphetamine in Alexandria, the place of venue. The defendants were identified as the source of both, and testimony showed they were aware of the coconspirators' distribution activities in Louisiana. The court noted that venue is proven only by a preponderance of the evidence and may be waived more easily than other constitutional rights. *Id.* at 1124. The court stressed that all counts designated the Western District of Lousiana as he situs of the offenses and that there was overwhelming, un-

contradicted evidence of possession and distribution there. *Id.* at 1125. The court therefore concluded that trial testimony did not place venue in issue, *id.* at 1125-26, and also noted that any error from denial of the venue instruction was harmless, *id.* at 1126 n.13.

Although these cases are helpful to our analysis, they do not apply directly to this case. Venue was in issue in the district court. Defendants could have been convicted without the jury having concluded that they committed any overt acts in Minnesota. In *Green v. United States*, 309 F. 2d 852 (5th Cir. 1962), the defendants were charged with a moonshining conspiracy in the Northern District of Florida. Twenty-two of the overt acts charged occurred in the Southern District, where the case was transferred. The district court refused to instruct the jury that it was required to find participation in the overt act in the Northern District, and the Fifth Circuit reversed. The court stressed that venue had to be proven in the Northern District by proof of one overt act in that district. The court held: "The dangers of abuse are manifold if the Government can obtain an indictment for conspiracy in a district other than the district where the offense was actually committed merely by alleging that one act, *which need never be proved,* was committed in that district." *Id.* at 856 (emphasis in original). Similarly, in the present case, the jury should have been afforded the opportunity to make a finding of proper venue. This is not a case where proof of the charges necessarily resulted in a finding of proper venue.

It is clear, however, that evidence of the acts committed in Minnesota, including storage and shuttling of planes, was uncontroverted and substantial. The planes that flew the cover operations and the smuggling mission proven to the jury were stored and shuttled from Princeton to Florida.

Where evidence is this clear on the issue of proper venue, any error from denial of jury instructions on the issue is harmless. In *United States v. Jenkins*, 510 F.2d 495 (2d Cir. 1975), the defendant was charged with possession of welfare checks stolen from the mail. There was much evidence that the defendant owned a store in New York City where venue was proper, that he cashed the checks at a market there and would have the money within two hours, and that all the payees resided there. The court concluded that "the overwhelming evidence presented at trial of the commission of the crime in the Southern District would render harmless any error which may inhere in failing to submit the issue of venue to the jury." *Id.* at 498-99. Similarly, in *United States v. Gillette*, 189 F.2d 449 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951), the court found that although it was error not to instruct that some act of aiding and abetting in Manhattan was required in order to convict the defendant of charges there, the error was "not so grave as to require reversal." *Id.* at 452. There was ample testimony in *Gillette* that the defendant attended a meeting with other defendants in New York City, and made calls from there to Chicago to further the plan to transport counterfeit checks there. The court stressed that the jury, by convicting the defendant, necessarily believed the witness who testified to activity in New York City. *Id.* at 452, 454.

Defendants have not contradicted the evidence of activities in Minnesota to further the smuggling conspiracy. All were residents of Minnesota. The profits from smuggling activity were deposited there. In view of the overwhelming evidence of the acts that took place there, denial of the venue instruction was not prejudicial error. Moreover, the

Constitution assures proper venue to ensure against "the unfairness and hardship to which trial in an environment alien to the accused exposes him." *United States v. Johnson*, 323 U.S. 273, 275 (1944). This problem was not presented here.

III.

Appellants make numerous other assignments of error. Coulombe and Moeckly challenge the sufficiency of the evidence to support their conspiracy convictions. The facts as recited above provide sufficient evidence to uphold their convictions. They argue that Schmidt's testimony was unreliable because he testified pursuant to a plea bargain and feared prosecution. This was not a basis for excluding the testimony, but was a proper subject for impeachment on cross examination. *See United States v. Evans*, 697 F.2d 240, 245 (8th Cir.), *cert. denied*, 460 U.S. 1086 (1983). Other evidence, including hotel and customs records, fingerprint evidence, witness identifications of the parties together, and items found on the plane, corroborate Schmidt's testimony as to Coulombe. Schmidt's testimony regarding Moeckly's participation in preparing for the smuggling expedition, including adding auxiliary fuel tanks, flying cover, and being aware that Coulombe and Ramirez flew to the Bahamas to avoid customs planes, is sufficient to sustain his conviction. His actions show he was aware of the "essential object" of the conspiracy. *See United States v. Lee*, 743 F.2d 1240, 1250 (8th Cir. 1984). Accomplice testimony is sufficient to support a conviction when it is not incredible or insubstantial on its face. *United States v. Watson*, 677 F.2d 689, 691 (8th Cir. 1982) (per curiam).

Defendants also argue they were denied due process be-

cause Jack Devoe testified against them pursuant to a plea bargain conditioning sentencing recommendations on the quality and quantity of his testimony. They maintain the Government's discretion to make sentencing and parole eligibility decisions based on Devoe's testimony created a risk of perjury. Defendants rely on *United States v. Waterman*, 732 F.2d 1527 (8th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 2138 (1985), where a panel of this court reversed a conviction based on a witness' plea bargain and the full court affirmed the conviction by an equally divided court sitting en banc. *Waterman* is distinguishable because there the prosecution's favorable recommendations depended on whether the witness' testimony resulted in indictments. *Id.* at 1529. The court stressed that it was concerned with "the fairness of agreements to reward those who testify for the government *contingent upon* the content and results of their testimony." *Id.* at 1531 (emphasis in original). Here the district court held a hearing in which Devoe testified that the "quality" of his testimony referred to its truthfulness and had nothing to do with obtaining convictions. The district court properly concluded that the testimony was admissible because the plea agreement was not contingent upon success of the prosecution. The testimony of William Morris also was admissible despite the Government's recommendation of a lighter sentence to obtain it. *See United States v. Evans*, 697 F.2d 240, 245 (8th Cir.), *cert. denied*, 460 U.S. 1086 (1983).

Ramirez argues that Devoe's testimony should be stricken because the Government did not supply some of his previous testimony in compliance with the Jencks Act, 18 U.S.C. § 3500. This Act required the Government to turn over statements in its possession that relate to the subject matter

of the witness' testimony at trial. 18 U.S.C. § 3500(a). The Act applies to written statements of the witness and contemporaneous recordings or transcripts, including stenographic notes of testimony or statements. The district court ordered the Government to supply all Jencks material but the Government did not produce Devoe's testimony before a Royal Bahamian Commission, testimony in a Florida state grand jury proceeding, or a federal trial in Miami. Ramirez argues that this material may have concerned Devoe's plea agreement and should have been produced. The district court reviewed affidavits by officials of the Drug Enforcement Administration swearing that they did not have and had not seen transcripts of Devoe's testimony before the Bahamian Commission or the Florida state grand jury. The Jencks act does not apply to statements made to state officials when there is no joint investigation or cooperation with federal authorities. *United States v. Silva*, 745 F.2d 840, 845 (4th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1404 (1985); *United States v. Smith*, 433 F.2d 1266, 1269 (5th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). The district judge found, based on sufficient evidence, that the Bahamian Commission and the Florida state grand jury testimony were not Jencks materials and were not in the possession of federal authorities. In regard to the federal trial in Miami, the testimony had not been transcribed and therefore was not in possession of federal authorities. *United States v. Cagnina*, 697 F.2d 915, 922 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 175 (1983). It should be noted that the Government did produce a transcript of Devoe's testimony in another federal trial in West Palm Beach, Florida. The Government also produced a transcript of his testimony before a grand jury in Massachusetts, which the district court found was not relevant to defendant's trial.

The record reveals that the Government conducted an extensive search for Jencks material.

The efforts by the Government to produce the materials and the availability of other testimony by Devoe, who was not a major witness, support the conclusion that the admission of his testimony was not reversible error. Where there is no indication of bad faith on the part of the Government and no indication of prejudice to the defendant, courts have been reluctant to overturn convictions for noncompliance with the Jencks Act. *E.g., United States v. Izzi*, 613 F.2d 1205, 1213 (1st Cir.), *cert. denied*, 446 U.S. 940 (1980); *United States v. Rippy*, 606 F.2d 1150, 1154 (D.C. Cir. 1979) (per curiam); *United States v. Heath*, 580 F.2d 1011, 1019 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979).

Coulombe argues it was error to allow evidence of past crimes committed by Ramirez. He maintains that evidence of Ramirez' deep involvement in smuggling made it appear that those who worked closely with him also were involved. Coulombe objected that evidence of attempts by Ramirez to purchase marijuana in 1977 and 1978, his possession of a duffel bag full of cash wtih traces of cocaine in early 1981, and his attempts to help a smuggler, Morris, obtain funds from the estate of another smuggler were not admissible under Rule 404(b) of the Federal Rules of Evidence to show a common plan or scheme. The indictment charged the conspiracies began in the spring of 1981. The district court allowed the evidence of the 1977 and 1978 trips to show motive, knowledge, intent, and the development of a course of conduct. The evidence was admitted to rebut Ramirez' various defenses that he was flying intelligence misisons for the CIA, that he was smuggling aliens or

microfilm, and that he was involved in guerilla warfare in Central America. The evidence was not so far removed in time to make it inadmissible. *See United States v. Engleman*, 648 F.2d 473, 478-79 (8th Cir. 1981). The testimony by Morris showed Moeckly's knowledge of Ramirez' activities and past activity as his copilot. Because the testimony also showed Ramirez was interested in having Morris participate in smuggling activity, the court allowed the testimony as statements in furtherance of he conspiracy. The evidence was probative and was not unduly prejudicial to Coulombe. The district court properly gave cautionary instructions that the evidence was not to be considered against defendants not involved. *See United States v. Miller*, 725 F.2d 462, 466 (8th Cir. 1984). Moeckly challenges Morris' testimony, asserting it was not in furtherance of the conspiracy under Rule 801(d)(2)(E) of the Federal Rules of Evidence. Morris' testimony about Ramirez' statements that Moeckly was familiar with the smuggling operations furthered the conspiracy by allowing Morris to deal more easily with members of the conspiracy. Morris planned to fly cover for Ramirez and delivered auxiliary fuel containers to Ramirez and Moeckly.

Coulombe and Moeckly challenge the district court's denial of their severance motions. Moeckly moved for severance before trial, renewed his motion during trial as evidence was admitted to which he objected, and the court made a midtrial rule denying the motion for severance. He renewed his motion after conviction. Moeckly therefore has preserved this assignment of error. Rule 8(a) of the Federal Rules of Criminal Procedure permits joinder of offenses that are the same or of similar character or are based on the same transaction or a common scheme.

Moeckly's perjury and conspiracy charges are sufficiently related because the perjury charges helped conceal his participation in the conspiracy. Proof of the smuggling flight was necessary to show Moeckly perjured himself when he testified before the grand jury that he had not been to Florida in 1983. Although Coulombe did not renew his motion for severance and preserve the objection, joinder of offenses was proper to him as well for the same reasons. The district court properly denied Moeckly's severance motion as to defendants as well because severance would have required the same proof of the smuggling conspiracies in separate trials. Generally persons charged with conspiracy are to be tried together. *United States v. Miller*, 725 F.2d 462, 467-68 (8th Cir. 1984). Joinder of defendants was not unduly prejudicial.

Moeckly argues that his perjury conviction must be vacated because questions asked before the grand jury were not material to the investigation and his answers arguably were true. Perjury is defined in 18 U.S.C. § 1623 as knowingly making "any false material declarations before or ancillary to any court or grand jury" while under oath. Moeckly argues his statements were not material to the investigation because they did not tend to "influence, mislead, or hamper" he investigation. *See United States v. Lasater*, 535 F.2d 1041, 1047 (8th Cir. 1976). Moeckly was convicted for testifying falsely that he did not keep a pilot's log book and that he did not recall being in Florida in 1983. The questions posed were not ambiguous and Moeckly's denials, regardless of the availability to the grand jury of accurate information through other witnesses, tended to obscure Moeckly's whereabounts at critical times during the conspiracies. *See United States v. Williams*, 552 F.2d 226, 230 (8th Cir. 1977).

Moeckly asserts that he was denied due process by prosecutorial misconduct before the grand jury. When Moeckly asserted fifth amendment rights in response to inquiries, the prosecutor stated that the grand jury had the inherent authority to request the Government to investigate whether he asserted these rights frivolously. Appellant notes that it is the presiding judge who determines whether the assertion is valid and can order the witness to respond or face contempt. Moeckly maintains that this statement, the prosecutor's insistence on yes or no answers to his questions, and questions about his income and legal practice, harassed and discredited him and engendered hostility by the grand jury. Moeckly's responses had been evasive to the point of asserting his fifth amendment privilege when asked whether he had been served with a subpoena. The prosecutor's insistence on direct answers and inquiries into his income were entirely permissible. The misstatement on fifth amendment rights was not unduly prejudicial. The Government informed Moeckly that he had the right not to incriminate himself and to consult with counsel outside the presence of the grand jury. Moeckly was provided with a recess to allow consultation with his attorney. Moeckly also challenges the prosecutor's inquiry whether he had spoken to particular well-known criminal defense attorneys in connection with his subpoena to testify. Such questioning is prejudicial, irrelevant, and improper. *See generally United States v. Gold*, 470 F.Supp. 1336 (N.D. Ill. 1979). The prosecutor has been admonished by this court that such questioning must not recur. In the light of the evidence before the grand jury and the limited prejudice to Moeckly's rights, however, dismissal of the indictment is not warranted. We also hold that there was no reversible error in failure to inform

Moeckly that he was a target of the grand jury investigation. It was not clear that he was a target at the time of the investigation. Finally, Moeckly was not entitled to an entrapment instruction on the perjury charges. Moeckly was fully apprised that false statements exposed him to criminal penalties.

The defendants' convictions are AFFIRMED.

ARNOLD, Circuit Judge, concurring.

I join the Court's opinion, but desire to add a few words of explanation with respect to the issue of venue.

Venue in a criminal case is a constitutional right. It is also a question of fact which should be submitted to the jury. *United States v. Jackalow,* 1 Black 484 (1862); *United States v. Black Cloud,* 590 F.2d 270 (8th Cir. 1979). Here, as the Court says, "[v]enue was in issue in the district court." *Ante,* at 13. Furthermore, the verdict of guilty as to the offenses charged does not, as a logical matter, necessarily include a determination that anything was done in Minnesota. *Ibid.* Therefore, "the jury should have been afforded the opportunity to make a finding of proper venue. This is not a case where proof of the charges necessarily resulted in a finding of proper venue." *Id.* at 14.

It is nevertheless true, as the Court points out, that the evidence of activities in Minnesota was overwhelming and uncontradicted. As a practical matter, the chance that this jury could have disbelieved the evidence that one or more overt acts were committed in Minnesota, while still returning a guilty verdict, approaches zero. In this situation, I believe that *United States v. Netz,* 758 F.2d 1308 (8th Cir. 1985) (per curiam), requires us to affirm. There, the venue instruction proposed by the defendant did not correctly state the law, but this Court did not place its affir-

mance of the conviction solely on that ground. We also noted the strength of the government's evidence on the venue issue and the fact "that appellant had not disputed the government's evidence establishing venue by presenting any contrary evidence." *Id.* at 1312.

We are bound by this Court's panel decision in *Netz*. I therefore join the Court's opinion and judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B
JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5225MN September Term, 1984

United States of America,

Appellee

vs.

William Joseph Coulombe,

Appellant.

Appeal from the United States District Court for the District of Minnesota

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JUDGMENT

This appeal frou the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of the Court.

July 15, 1985

A true copy.
ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

DATED: 10/25/85.

APPENDIX C
ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-5223/5224/5225-MN

United States of America,

Appellee

vs.

Kent August Moeckly, et al.,

Appellants

Appeals from the United States District Court for the District of Minnesota

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The petitions for rehearing and rehearing en banc are denied.

Judges Heaney, McMillian, Arnold and Fagg would grant the petitions for rehearing en banc limited to the venue issue.

October 17, 1985